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Corbin Davis
Clerk, Michigan Supreme Court
P.O. Box 30052
Lansing, MI 48909

Re: Proposed amendments to court rules
Administrative File No. 2003-04

Dear Mr. Davis,

I am writing to offer my reflections on proposed amendments to the Michigan Court Rules in the area of criminal procedure. I have been handling, exclusively, criminal appellate and postconviction work, state and federal, for over 30 years. My experience tells me that a number of these proposed changes will negatively impact the ability of poor people to seek and obtain justice in Michigan – at a time when a newly released national study by University of Michigan Law School Professor Samuel R. Gross indicates the likelihood that thousands of prisoners are held for crimes they did not commit.

Proposed changes to MCR 6.500 et seq.

I authored the comments on these proposals filed by the Criminal Defense Attorneys of Michigan and will not repeat those points here. I would like to emphasize, however, that a very large percentage of prison inmates have neither the resources nor the ability to mount effective challenges to unjust convictions. Further cutting poor people off from any ability to seek redress is inconsistent with the underpinnings of a free society. The time limits, page limits and highly restrictive standards of review put forward in these proposals are clearly aimed at doing just that.

Consider a criminal defendant, mentally retarded, convicted of armed robbery by plea of guilt with no advice of rights and no attorney present, sentenced to 100-150 years in prison (despite the fact that he was a first offender, played a peripheral role in the crime due in part to his mental retardation, and no one was hurt). The sentencing judge states on the record that the sentence is based exclusively on defendant's race. No one would deny the gross inequity of such a scenario. Yet these proposed rules would not

allow postconviction relief in Michigan because there is no ability to demonstrate actual innocence and because the sentence is within statutory authorization.[1]

Undoubtedly this Court has a legitimate strong interest in docket control and efficiency. Under Michigan's "one court of justice" this interest extends to the trial and intermediate appellate courts. However, experience has shown that unreasonable restrictions on the access of the poor to justice will create more systemic problems than they will solve. As pointed out in the comments put forward by the Criminal Defense Attorneys of Michigan and other long time criminal defense practitioners, notably James S. Lawrence and Craig A. Daly, that is precisely what the majority of these proposed changes will do. I strongly urge the Court to consider these comments when deciding what form our state postconviction process will take in the years to come.

6.004(C) bond denial in delay situations

The proposed change authorizes indefinite confinement in pre-trial limbo. The problem here is not that the change authorizes confinement of those who are deemed flight risks or a danger to others beyond six months, the problem is the removal of any sanction if the court and the prosecution neglect a defendant's speedy trial rights. It is simply too easy in many cases to claim flight risk or danger. If this Court insists on elimination of this consequence (release on recognizance) of not moving forward with a criminal prosecution, some reasonably effective substitute should be put in place.

Again, the proposed change is aimed at the poor. Those without resources and a community base will be deemed flight risks in almost every case. Those with funds will be bailed out already.

6.004(D) elimination of 180 day rule

While it could be claimed that the change proposed merely tracks the actual statutory language (MCL 780.131), such a suggestion would ignore the historical fairness rules under court rule and case law in this area. The idea behind the rule is to require an effort to get a case moving in the courts when the prosecutor who has brought charges becomes aware that a defendant is in prison or when the Department of Corrections learns that a prosecution has been filed. Formerly, when either of these occurred, the 180 day clock began running. Previously the clock started running at the point the prosecutor

[1] Further assume that the defendant in the hypothetical was unable to mount a challenge within the time allowed for direct review. In such a situation the proposed changes would eliminate any ability to seek recourse if the defendant, several years down the road, somehow obtained resources to employ counsel or was able to obtain *pro bono* counsel, in two ways. In addition to the exclusion of a pleader with no showing of actual innocence whose sentence is within statutory limits, this defendant would be timed out under the proposals.

"had reason to know" even if actual knowledge was lacking. *People v Hill,* 402 Mich 272 (1978). A previous court rule change required actual knowledge on the part of the prosecutor before the 180 day period began to run on inaction. *People v Taylor,* 199 Mich App 549 (1993).

The current proposal would virtually eliminate the 180 day rule. It would not matter what the prosecution or the department knew (or when they knew it). The trigger is transmittal of notice from the department to the prosecutor **without any stricture or sanction for failure to send the notice.** It is ironic that a rule set up to protect defendants against inaction can be itself foiled through inaction without a remedy. Changing the requirement from a good faith effort to actual trial, as proposed, would actually do more harm than good under these circumstances as, again, there is no requirement that the notice be sent and this latter change will pressure in favor of inactivity.

6.006 allowance of video testimony

This court has recently underscored the importance of a trial judge's assessment of witnesses (*People v Cress,* 468 Mich 678, 691 (2003)) and the United States Supreme Court has just re-affirmed the critical constitutional importance of confrontation (*Crawford v Washington,* __ US __; 124 S Ct 1354 (2004)). While conducting arraignments or status conferences via video might not cause problems, any time credibility assessment is important in the context of the proceeding, physical presence is a necessity. This is especially true at trial where a defendant's liberty is in many instances contingent on a jury's assessment of one or more witnesses. Subtle cues, body language, interaction with others in the room, all can be telling in assessing whether the truth is being told from the stand. Picking this up over a video link is difficult, if not impossible.

Allowing a voluntariness determination over a video link in the plea context will create serious problems as well. The vast majority of our prison population have arrived through a plea of guilt, and a key issue in that process is voluntariness. This requires the plea taking court to conduct an assessment that is similar to and just as vital as witness credibility determinations. Justice demands that this be done face to face.

6.110(C) and (D) elimination of evidence rules and 4th amendment protections at preliminary exam

The elimination of reference to evidence rules at exam is unnecessary, despite the fact that MRE 1101((a) ostensibly covers this, subject to the exception in 1101(b)(8). Applicability of the evidence rules is important – they will discourage lame cases from being bound over – and they should be underscored by leaving the reference as stated in MCR 6.110(C). Slight redundancy is worth avoiding the confusion inherent in striking the applicability language from 6.110(C).

The same logic applies to eliminating 4th amendment protections at exam. Why permit a prosecution based on inadmissible evidence to move forward? Such a course is extremely inefficient and sharply tilts the playing field in favor of the prosecution.

6.113(D) – elimination of exam transcripts for indigents at trial

Again, the proposal hurts the poor in a significant way. Monied defendants will still be able to order and pay for exam transcripts for use at trial. A transcript of the exam is essential, not only for use at trial in testing credibility, but for adequate preparation for trial. There is simply no good reason why this tool should be pried from the hands of the poor. This change is not only unwarranted, it is mean-spirited.

6.201 – discovery changes

This writer would refer the Court to the response prepared by the Criminal Defense Attorneys of Michigan on these points. While generally covered in 6.201 for felony charges, the rules should clearly express the need of the prosecutor to turn over all police reports **and witness statements** in felony cases and in district court cases under 6.601(F). Expert reports should not be exempted from discovery in favor of the prosecutor's "written description" of the substance of the expert's testimony. The requirement of automatic provision of documents or photos to be introduced at trial should not be eliminated – the purpose of discovery is to avoid trial by ambush. Allowing protective orders to prevent "embarrassment" is inappropriate, setting up a vague standard that will be impossible to evenly apply.

6.302 plea rights on paper
6.302(B)(6) elimination of advice on lack of appeal rights

Currently misdemeanor defendants can be instructed on the rights they are giving up by placing the information on paper and asking the defendant if he or she understands what is being lost (without orally advising of rights). Setting up this shortcut in felony cases is unwise and unnecessary. Every effort should be made to avoid filling a very expensive and substantially expanded prison system with involuntary pleaders.

Also impacting voluntariness is the elimination of advice of rights on the availability of counsel on appeal for the poor. While this Court has determined that the poor should not have the assistance of counsel to engage the application for leave process, as do monied defendants, the issue will ultimately be decided by the United States Supreme Court in the *Tesmer* case. This may become a moot point. If the United States Supreme Court upholds this Court's stance on the issue, however, there is no good reason why pleading defendants should not be told of this consequence of their action. This is a substantive right as opposed to a procedural rule, and eliminating a statutorily

mandated directive to so advise guilty pleaders violates this Court's pronouncement in *McDougall v Schanz,* 461 Mich 15 (1999) (See MCL 770.3a(4)).

6.310, 6.311, 6.429(B)(3) reduction of time for seeking plea withdrawal/correction of sentence

These proposals would reduce the relevant time frames from one year to six months. A number of the arguments made in connection with time limits in the MCR 6.500 area apply here as well. Justice need not be circumscribed in such a manner, especially when the restrictions will fall most heavily on the poor.

6.414(E) allowing jury questions

Such a change will create constitutional problems, primarily for the defense, as recently outlined by the Minnesota Supreme Court, and should not be adopted. See the comment furnished by attorney Randy E. Davidson.

6.414(H) permitting prosecutors to close trials

In over thirty years of appellate and postconviction practice this writer has never seen a case where instructions preceded arguments, and cannot imagine an instance where the defense would accede to allowing the prosecutor the last word before the jury deliberates. A balanced and neutral presentation on the law they must follow should always be the last thing the jury hears before engaging their critical decision making function. Moving control of this aspect from the parties to the court will increase prosecutorial "sandbagging" at trial and litigation on appeal.

6.431(A)(3) reduction of time for filing new trial motion

In cases where a claim is not timely filed, a defendant had up to a year (time within which a leave application could be filed) to file a motion for new trial. Elimination of this provision cuts this to 42 days. Again, consistent with the comments put forward here and in the response of the Criminal Defense Attorneys of Michigan in relation to the proposed changes in the 6.500 process, such a change will inure to the detriment of the poor who are without resources to move expeditiously and is simply not warranted.

6.433(B)(1) & (2); 6.433(C)(1) & (2) eliminating access of the poor to court papers and transcripts

In a further, and critical, slap at the poor who are relegated to filing a leave application or who have been timed out from that process, the proposal, in a subtle but high impact maneuver, eliminates the automatic provision of transcripts and lower court papers. This is done by changing "that" to "why" (the poor must now indicate why the records are needed, not just that they are needed) and demanding an order of the court. These changes move back the clock in this area and set up the likelihood of extended litigation on a case by case basis as poor defendants with no resources and likely with severe mental and physical problems try to do what even experienced lawyers could not – adequately express to the trial court the legal and factual basis on which they are seeking redress without transcripts or court documents.

This proposal will also lead to inevitable disparity across the state as some trial courts will continue to provide needed materials to the poor, some will extensively examine the requests and some will virtually never order production. This change is insidious and unwarranted. The current practice of ministerially providing transcripts and court papers to the poor through the clerk should be continued.

Conclusion

Many of these proposals are aimed at the poor. In a state which undeniably already ranks near the bottom nationally in resources allocated to criminal defense of the poor, such a tightening of the process is unwarranted and, given the huge costs of our corrections system, fiscally unwise. This writer thanks the Court for the opportunity to comment and urges that additional thought be given before implementation of the provisions noted above.

Sincerely,

F. Martin Tieber